



## CHAPTER 3

# Contract Provisions

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*Contracts must be clearly written and detailed enough to describe the services expected from the contractor.*

A good contract is one that is readily understood, clearly describes the services expected from the contractor, is manageable, and provides a mechanism for measuring the contractor's performance. All contracts should contain, at a minimum, six basic elements:

- Identification of the parties entering into the contract;
- Signatures of the individuals authorized to bind the parties to the contract;
- A clear description of the work and services to be provided;
- The performance period, including dates when deliverables are due;
- Compensation terms, including the amounts and timing of payment; and
- Terms and conditions, including program and fiscal accountability requirements, as applicable to protect the interests of the parties.

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### 3.1 Model Contract Terms

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A model client service contract is included in [Appendix D](#) of this guide. This is an example only and includes model terms and conditions for state contracts. This document may serve as a useful tool for appropriate words and clauses when formulating a contract. These clauses are currently found in many state client service contracts. Keep in mind this document is not all-inclusive and only contains model terms and conditions, not individualized clauses that may be tailored to a specific contract.

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### 3.2 Scope of Work

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The scope of work or statement of work should be an accurate, thorough, and measurable description of the essential and technical requirements for the services to be provided. The description should include the desired results and standards to be used to determine whether the requirements have been met.

An effective scope of work is:

- Clearly written, using plain English;
- Results focused, addressing specific procedure or process requirements only when necessary;
- Clearly defined, including all aspects of performance;
- Complete, covering all issues and expectations in sufficient detail; and
- Measurable, in order to determine if and when the contractor has successfully completed performance, and when and how much the contractor should be paid.

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### 3.3 Amending Contracts

Occasionally, it will be necessary to amend a contract by executing a formal modification or amendment. Amendments should be in writing and should contain the same degree of specificity for changes that the original contract contained for the same item. Amendments should be entered into and finalized before the expiration of the original contract.

Documentation of amendments is extremely important. Timely execution of an amendment minimizes misunderstanding, confusion, and loss of momentum that can occur in the absence of a timely written record of changes.

The principle areas where changes are made and for which amendments are required include:

- **Scope of Work** – This may include adding, modifying or deleting tasks, services or deliverables or revising specifications. A change to the scope of work must remain within the general scope of the original contracted service.
- **Cost** – If the amount of money obligated under the contract, whether in the form of fees, hourly rates or maximum consideration, is increased or decreased, a contract amendment is required.
- **Period of Performance** – An extension to the end date of the contract is the most common change to the period of performance.

### 3.4 HIPAA

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The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law addressing several aspects of health insurance and the management of health care information. (Pub. L. 104-191, 110 Stat. 1936, 2054 and 110 Stat. at 2063) ("HIPAA"), and 45 CFR part 160 and part 164. Some client service contracts may require language required by HIPAA in order for the contracting agency to be in compliance with HIPAA. If the service provider is a physician or other medical care provider, they may seek insertion of HIPAA language into the contract so that they are in compliance with the federal law.

HIPAA contains requirements related to the confidentiality of protected health care information, electronic transmission of health care information, including billings, and the security of health care information. It also requires retention of records covered by the law for a six-year period of time.

These provisions generally relate to "business associate" arrangements, where one of the contracting parties is a business associate of a covered entity under HIPAA or where both parties are covered entities sharing protected information. The decision about whether or not HIPAA compliance language or an addendum should be part of the contract is based on whether the parties fall under HIPAA's legal definition of a covered entity or business associate. The law provides exceptions for certain types or uses of information as well.

When the issue of inserting HIPAA language into a contract is raised, the following considerations apply:

- Are either or both of the contracting parties covered entities under HIPAA?
- Does the provided service include the sharing or disclosure of HIPAA protected health care information?
- Is the type of information created, stored or disclosed in the scope of services covered by the contract-protected information under HIPAA?
- Are either or both of the contracting parties business associates as defined under HIPAA?

If the answer to any of these questions is yes, please contact your agency HIPAA compliance officer or the assistant attorney general for your program to determine whether HIPAA language needs to be part of the contract.

### 3.5 Performance Measures and Outcomes

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Contract managers may want to consider whether performance measures and outcomes should be identified. The purpose of performance measures is to provide a standard or measure for performance of the contracted client services. Performance measures are also used to determine if, and when, the contractor has successfully completed performance, and when and how much the contractor should be paid.

Contract performance measures may:

- ✓ Define the standards for measuring contractor performance;
- ✓ Provide a means to monitor performance;
- ✓ Measure satisfaction with the contractor and client; or
- ✓ Provide data for program evaluation.

When developing performance measures, consideration should be given in advance as to how the data is to be submitted, analyzed, and maintained.

Key questions to consider include:

- ✓ How much information can reasonably be requested, submitted, and analyzed?
- ✓ How often and on what schedule must the data be reported?
- ✓ How will the information be submitted?
- ✓ Who will receive the information?
- ✓ How will feedback be provided to the contractor?
- ✓ What is the cost and benefit of each proposed performance measure?

Characteristics of good performance measures:

- ✓ Are easily understood by contractors, state agencies, and the general public;
- ✓ Focus on the performance expected from the contractor;
- ✓ Are well defined and consider both the quantitative (how much?) and qualitative (how well?) aspects of performance;
- ✓ Include a well-defined method for reporting data;
- ✓ Are relevant, timely, and verifiable; and
- ✓ Are realistic in terms of available resources, funding and timelines, and recognize external factors beyond the control of the system.

Contract managers should check the funding source or statutory authority to determine whether any specific outcomes are mandated.

Then, consider the following questions:

- ✓ How will you know the service has actually been provided (other than taking the contractor's word for it)?
- ✓ Are you concerned about the *quality* of the service? If so, include a mechanism for measuring quality.
- ✓ Are you looking for a specific outcome, such as job retention?
- ✓ Is payment contingent on an event, product or outcome? If so, how will you ascertain that the contractor has satisfied the requirement? If not, consider tying payment to an event, product or outcome.

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### 3.6 Performance-Based Contracts

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Performance-based contracts describe **what** the contractor is expected to accomplish, **not how** the contractor will complete the work. Therefore, contractors provide more strategic input into determining the best method and approach for the services to achieve the results desired by the state. Performance-based contracts typically tie payments to outcomes or deliverables, not just the number of hours of service provided. Agencies are encouraged to use performance-based contracts whenever feasible, as a means to achieve specific outcomes related to the services provided.

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### 3.7 Hold Harmless and Indemnification

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The Hold Harmless and Indemnification provisions in client service contracts protect state agencies from assuming responsibility for the *contractor's* acts and omissions. These provisions do not shield the state agencies from responsibility for its own acts and omissions.

Under the **Hold Harmless** provision, the contractor releases state agencies from any responsibility for losses to a third party arising from the acts and/or omissions of the contractor or its officers, directors, partners, employees, and agents while the contractor is performing work under the contract. For example, if a client is injured in a contractor's facility due to the carelessness of one of the contractor's employees, the contractor cannot seek reimbursement from state agencies for the amount the contractor has to pay to the client who suffered the loss.

The **Indemnification** provision requires the contractor to reimburse state agencies for losses incurred by state agencies because of the contractor's acts or omissions in performing under the contract.

One example is when a state agency is sued by a client who is seriously injured when she falls through a rotting front step at the contractor's place of business. If the client sues the state agency for those injuries, the contractor would have to pay all costs for investigating, negotiating, defending, and settling the suit.

Refer to the model client service contract in [Appendix D](#) for examples of language.

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### 3.8 Liability Insurance

The Office of Financial Management Risk Management Division (RMD) recommends that agencies include insurance requirements in their contracts. At a minimum, RMD suggests that contractors be required to purchase general liability and employer's liability insurance and comply with workers compensation laws. For more information on RMD's suggested insurance specifications, refer to *Contracts: Transferring and Financing Risk*. This manual is available in hard copy through RMD or on the OFM website at: <http://www.ofm.wa.gov/rmd/risk/contrman.htm>. If you have further questions, you may contact the Risk Management Division at (360) 902-7303. Contract managers should contact agency internal staff who may be knowledgeable about insurance requirements before contacting RMD.

Contract managers should analyze the type of services to be provided and evaluate the state's exposure to legal liability that may result from contracting. State agencies can be financially protected from those who seek legal recourse by requiring client service contractors to carry insurance.

Insurance can also protect clients by providing a funding source for those clients seeking recovery from a contractor in the event of a loss or injury. For example, if a state agency client is injured at a contractor's place of business, and if the contractor has insurance covering such claims, the insurance can be used to fund the client's losses. If the contractor does not have insurance, the client may not be able to recover his/her medical bills and other losses associated with the injury.

Refer to the model client service contract in [Appendix D](#) for examples of language.

### 3.9 Industrial Insurance Coverage

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When a state agency enters into a client service contract, the contractor's employees should be covered by industrial insurance. This protects the state's interest, if either the contractor or someone employed by the contractor is injured while performing work under the contract.

With few exceptions, Title 51 RCW holds the contracting agency responsible for making sure the contractor has coverage. Employments excluded from mandatory coverage are listed in RCW 51.12.020 and include sole proprietors, partners, corporate officers and others. The employer may elect optional coverage for these employments.

To promote compliance with Title 51 RCW and avoid unplanned financial liability for the payment of industrial insurance premiums, agencies should review RCW 51.08.070, 51.08.180 and 51.08.195 and determine whether a potential contractor meets either the definition of "employer" or that of a "worker." Making this determination may require a complex analysis.

To assist in determining whether the designation of "employer" or "worker" is applicable, please call the Field Audit Compliance of the Department of Labor and Industries at (360) 902-4769, (360) 902-4753 or you may contact by email at [verifystatecontracts@lni.wa.gov](mailto:verifystatecontracts@lni.wa.gov). For security, please include (1) your full name, (2) your agency name, (3) the purpose of your request, and (4) an explanation of the attachment, if any.

For client service contracts where the contractor meets the definition of "employer" under RCW 51.08.070, the following language should be incorporated in the contract's general terms and conditions:

**Industrial Insurance Coverage** – The contractor will comply with the provisions of Title 51 RCW, Industrial Insurance. If the contractor fails to provide industrial insurance coverage or fails to pay premiums or penalties on behalf of its employees, as may be required by law, the agency may collect from the contractor the full amount payable to the Industrial Insurance Accident fund.

The agency may deduct the amount owed by the contractor to the accident fund from the amount payable to the contractor by agency under this contract, and transmit the deducted amount to the Department of Labor and Industries (L&I), Division of Insurance Services. This provision does not waive any of L&I's rights to collect from the contractor.

In those instances where the contractor meets the definition of "worker" under RCW 51.08.180 and 51.08.195, the Department of Labor and Industries suggests the following alternative language:

The agency acknowledges that the essence of the work specified in this contract constitutes personal labor, thus making the contractor a covered "worker" as defined in Title 51 RCW. The agency therefore agrees to provide industrial insurance coverage for the contractor during the course of employment under this contract, as may be required under Title 51 RCW.

Contractors must be licensed with the Department of Labor and Industries to perform work in the construction trades. The types of work that require such licensing are described in RCW 18.27.010 and 19.28.120. Agencies can verify a contractor's compliance with Titles 18 and 19 RCW by contacting the Contractor Registration Unit at (360) 902-5202.

In the event the contractor is found to be noncompliant, the agency may still enter into the contract, but should notify the contractor that no payments for service provided under the contract will be made until the contractor furnishes evidence of full compliance. For long-term contracts, the agency should require the contractor to provide proof of continuous compliance with Titles 18 and 19 RCW prior to release of final payment under the contract.

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### **3.10      Fiscal Issues/Reporting**

Methods of compensation and billing should be clearly identified in the contract. Refer to Chapter 2, Pre-Contract Planning, for a discussion of the various methods of compensation.

Financial reporting provisions require a contractor to report on or allow access to financial information at defined intervals during the contract or upon contract completion or termination. The purpose of financial reporting provisions is to aid in monitoring contractor performance and/or fiscal accountability and to allow contract managers to make informed decisions about the contractor's ability to perform.

Key considerations for financial reporting provisions are:

- ✓ Define the type of information and documentation required;
- ✓ Specify dates or intervals for reports, if any;
- ✓ Require access to contractor staff, records, place of business, and client records, as appropriate; and



- ✓ Require intensive financial record monitoring based upon the method of compensation.

Refer to the model client service contract in [Appendix D](#) for examples of language.

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### **3.11 Fiscal Documentation**

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The contract should define the information and documentation required to justify payment.

At a minimum, payment documentation should include evidence of authorization for purchase, receipt of goods or services, and approval for payment. For client service contracts, the evidence of authorization for purchase is the contract. The evidence of receipt of services is generally the contractor's invoice and appropriate supporting documentation, such as sign-in sheets showing training participants. The approval for payment can be documented by the initials of the approving staff and date on the contractor's invoice or by an electronic approval process.

For further information, refer to Section 85.32.30 of the State Administrative and Accounting Manual, published by the Office of Financial Management at <http://www.ofm.wa.gov/policy/85.32.htm>.

Financial record retention and access should follow state agency requirements and should be identified in the contract. The Office of the Secretary of State publishes the General Records Retention Schedule for Agencies of Washington State Government at <http://www.secstate.wa.gov/archives/ga.aspx>

Refer to the model client service contract in [Appendix D](#) for examples of language.

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### **3.12 Remedies and Sanctions**

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Remedy and sanction contract language permits the imposition of penalties or other terms against a party for noncompliance with the contract. The purpose of remedy and sanction provisions in a contract is to ensure compliance with the contract terms by all parties to the contract. Also, these provisions allow options to correct, sanction or terminate a contractor, who fails to adequately perform under the terms and conditions of the contract.

Considerations for remedy and sanction provisions:

- What mechanisms are in place to ensure contract compliance and performance?
- Do federal or state requirements exist that must be enforced?
- Which provisions will most likely encourage contract compliance and performance?
- Are alternative service contractors available?
- What are the implications of service disruption to clients?

Remedy and sanction provisions may include:

- Implementation of a corrective action plan after auditing or monitoring;
- Financial incentives or penalties, including the right to withhold payment;
- Federal debarment or suspension of the right to contract with an agency or agencies;
- Preservation, protection, and return of information and property;
- Dispute resolution procedures;
- Summary suspension of the contract; or
- Termination of the contract.

Refer to the model client service contract in [Appendix D](#) for examples of language.

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### **3.13 Terminating Contracts**

Termination provisions in a contract permit a party to terminate or end a contract prior to the expiration date. The purpose of a termination provision is to define the rights of the parties to terminate, including required terms, conditions, and notices.

Generally, there are two types of termination:

- Termination for default (or breach); or
- Termination for convenience.

Considerations for termination for default and convenience include:

- Which parties will have the right to terminate for convenience?
- Which parties will have the right to terminate for default?

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- Under what conditions does each party have a right to terminate?

Examples include:

- Change or loss of funding;
- Convenience of one or both parties;
- Was there failure to meet or maintain conditions or qualifications necessary to carry out the terms of the contract?
- Was there breach or default of contract obligations?
- Was there failure to comply with applicable laws or regulations?
- Was there failure to ensure client health and safety?

Another consideration under termination for convenience is when funding is withdrawn from a contract. In this situation, which is addressed in the “Savings” clause in the model client service contract, a termination for convenience process is used.

Other considerations related to contract termination include:

- How much notice must each party give?
- Must there be an opportunity to correct?
- Is dispute resolution a pre-requisite?
- What procedures or rights do the parties have after termination?
- How will the contractor cease performance of services?
- Which contract provisions survive termination or expiration?
- Access to staff, records, and place of business.
- Preservation, return and delivery of information and property.
- Safety and transfer of clients and/or client property.
- Withholding payment and damages.
- Other specific termination instructions.

Refer to the model client service contract in [Appendix D](#) for examples of termination language.